

4130

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE TRANSPORTATION REGULATION BOARD

Application of Chicago & North
Western Transportation Co.,
St. Paul, MN for Authority to
Retire and Remove 443 Feet of
ICC Track Nos. 174, 85 and 80
Located in Butterfield, MN

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDED ORDER

The above-entitled matter came on for hearing in St. James,
Minnesota on
May 28, 1987, before Bruce D. Campbell, Administrative Law Judge from the
Minnesota Office of Administrative Hearings.

Appearances: David A. Donna, Attorney at Law, 4200 IDS Center,
Minneapolis, Minnesota 55402, appeared on behalf of the Petitioner, Chicago
North Western Transportation Company (Railroad or CNW); Daniel A. Birkholz,
Attorney at Law, P.O. Box 461, 101 South Seventh Street, St. James,
Minnesota
56081, appeared on behalf of Tony Downs Food Company and Butterfield Foods
Company; Gerald L. Hempeck, Mayor, City of Butterfield, Butterfield,
Minnesota
56120, appeared on behalf of the City of Butterfield; and Michael P.
Kircher,
Attorney at Law, 108 Armstrong Boulevard South, St. James, Minnesota
56081-1797, appeared on behalf of Glenn Adrian, John Adrian, and
Butterfield
Oil Company. Roger A. Laufenburger, Chairman, Transportation Regulation
Board, attended the hearing on behalf of the Transportation Regulation
Board
(Board).

The record herein closed on May 28, 1987, at the close of the hearing,

Notice is hereby given that, pursuant to Minn. Stat. 14.61, and the
Rules of Practice of the Public Utilities Commission, as applicable to the
Transportation Regulation Board, and the Rules of the Office of
Administrative
Hearings, exceptions to this Report, if any, by any party adversely
affected
must be filed within 20 days of the mailing date hereof with the
Transportation Regulation Board, Minnesota Administrative Truck Center,
254 Livestock Exchange Building, 100 Stockyards Road, South St. Paul,
Minnesota 55075. Exceptions must be specific and stated and numbered
separately. Proposed Findings of Fact, Conclusions and Order should be
included, and copies thereof shall be served upon all parties If
desired, a

reply to exceptions may be filed and served within ten days after the service of the exceptions to which reply is made. Oral argument before a majority of the Board may be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply, and an original and five copies of each document must be filed with the Board.

The Minnesota Transportation Regulation Board will make the final determination of the matter after the expiration of this period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Board may at its own discretion, accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Board as Final order.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether retirement and removal of 443 feet of ICC Track Nos. 174, 85 and 80, located in Butterfield,

Minnesota should be authorized by the Transportation Regulation Board, pursuant to Minn. Stat. 219.681, 219.741 (1986).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. By Petition dated March 4, 1987, and received by the Transportation Regulation Board on March 9, 1987, the Petitioner sought permission to retire and remove 443 feet of ICC Track Nos. 174, 85 and 80 located in Butterfield, Minnesota. Notice of the Petition and an Opportunity for Hearing was published in the Transportation Regulation Board's weekly calendar dated

March 13, 1987. Timely objections to the Petition were filed by Tony Downs, Tony Downs Food Company, Butterfield Foods Company, the City of Butterfield, Minnesota, John Adrian, Glenn Adrian and Butterfield Oil Company. by Order for Hearing published in the Board's weekly calendar of April 24, 1987, and thereafter, the board ordered that a hearing be held in St. James, Minnesota on May 28, 1987. A copy of the Order and Notice was mailed to all interested parties,

As a consequence of their protests to the Petition, and without action from the Railroad, the following were made parties to this proceeding: the City of Butterfield; Tony Downs Food Company; Butterfield Foods Company; Glenn Adrian; John Adrian; and Butterfield Oil Company.

3. ICC Tracks No. 85, 80 and 174 are siding track running east and west, parallel to the Railroad's main track in Butterfield, Minnesota, a segment of

the Applicant's main track running in an east-west direction between Mankato and Worthington, Minnesota. The tracks sought to be removed as a consequence

of this proceeding are depicted in yellow marking on Railroad Exhibit 1. As respects the Protestants to the Application, Butterfield Foods Company is adjacent to the 174 track, Butterfield Oil Company is located in proximity to

track 85 and track 80 connects tracks 174 and 85.

4. The siding tracks were initially constructed prior to 1913. They are instructed of 50-pound rail. The current internal standards of the Railroad now require at least 80-pound rail for general use.

5. There is no evidence in the record of the last time tracks 174, 80 1 85 were inspected or repaired, They have not, however, been maintained noc at least the last five years. The tracks show extreme deterioration, with

broken rails and overgrown weeds and brush. The current condition of the tracks, individually, is as depicted in Railroad Exhibit No, 2, Photographs 1-7.

6. The federal requirements for Class I track, the lowest classification of acceptable track, require appropriate ballast and at least five non-defective cross-ties per 39 feet of track, with a maximum distance of 100 inches between non-defective ties, center to center. Railroad Ex 3,

213.109. Tracks 80, 85 and 174 do not currently conform to federal minimum safety standards for Class I track. The federal standards have been adopted in Minnesota to define the necessary condition of track used to a railroad's operations Minn. Stat. 219.01 (1986)

7. The federal standards for inspection and maintenance, Subpart F of the Track Safety Standards of the United States Department on Transportation, Railroad Ex. 3, require periodic inspection, even of Class I track, and immediate remedial action to repair any deviations from the federal standards. Railroad Ex. 3, 213.233(c). Compliance with federal standards may be required, at any time, by either federal or state safety officials.

8. To bring track 80 into a safety condition consonant with a FRA Class I Track Safety Standard would require an expenditure by the Railroad of \$6,203, calculated as follows: labor, \$1,669; materials, \$1,431; other expenses, \$402; and additives, \$2,700. Railroad Ex. 4.

9. To rehabilitate track 85 to a safety condition consonant with a FRA Class I Track Safety Standard would require an expenditure of \$244; calculated as follows: labor, \$1,172; materials, \$709; other expenses, \$244; and additives, \$1,546, Railroad Ex. 5.

10. To rehabilitate track 174 to meet FRA Class I Track Safety Standards would require an expenditure by the Railroad of \$3,978, calculated as follows: labor, \$1,278; materials, \$804; other expenses, \$278; and additives, \$1,617.

11. Annual maintenance expense by the Railroad for tracks 80, 85 and 174, after rehabilitation, would be about 15% of the initial rehabilitation cost of each track, See Findings 8-10, supra.

12. Although removal of the tracks would eliminate one track street crossing in Butterfield, there is no evidence in the record that any

particular safety problems are associated with that track street crossing, or that any injury or property damage has occurred at any of the street track crossings in Butterfield.

13. The shipping records of the Railroad, which have been maintained from 1983 to the present date, show no inbound or outbound Railroad traffic for Butterfield Oil Company, Butterfield Foods Company, or Buehler Construction Company since 1983. There is no evidence in the record of the last time that any protesting party received or shipped goods on the subject track, No shipper has informed the Railroad of a definite intention to use tracks 80, 85 or 174 in the operation of its business.

14. Tony Downs Food Company and Butterfield Foods Company are jointly owned. Tony Downs Food Company is primarily located in St, James, Minnesota.

es rail traffic in St. James and will continue to do so. Butterfield
4. Company is a processor of frozen prepared food, located in
Butterfield,

Recently, Butterfield Foods began expanding its operation to convert the
by-products resulting from the manufacture of prepared frozen dinners into
animal protein. Its current customers and sources of supply make the use
of

transport the most efficient method of transportation. Butterfield
has not used rail transport for at least the past five years and
there

no evidence in the record as to when it last used rail transport
Butterfield Foods has 13 semi-trailer trucks for its use and employ; both
dependent contractors and employee truck drivers to transport the
materials

Products involved in its operation. Within the past six months, it
has

wased an additional truck tractor-trailer unit. At least as far as
its

sent operation is concerned, transportation by truck is more timely and
appropriate than rail transport. Although it has been conducting
feasibility

es on its transportation needs, the Company hasn't studied the cost of
shipping by rail or the potential use of rail transport in its business.

Butterfield Foods has not communicated to the Railroad any definite
intention

the tracks included in the Petition. It desires that the track be
and, perhaps, upgraded, as an indefinite contingent measure shown
transportation needs change to make rail transport more attractive and
some
future date,

!S. Glenn Adrian and John Adrian are the owners of Butterfield Oil
company, a local fuel oil distributor, Adrian Elevator, the local grain
elevator, and a recently purchased fertilizer plant which was previously
closed. As regards the Petition herein, only Butterfield Oil Company is
located on the subject tracks, more specifically, tracks 80 and 85. There
is

evidence in the record that the elevator has ever used rail transport,
or

do so in the future or requires the maintenance of tracks 80 and 85,
, although the fertilizer plant has been partially refurbished and the owners
are currently considering resuming operation, it is not located on any of
the

vs in question. It could continue to use rail transport even if the
three

icks were closed. The oil company was purchased by the Adrian brothers
in
1986 and, since that time, they have been considering the transportation
needs

"he oil company. Butterfield Oil Company has not adopted any plans for
the

of rail transport. It has not conducted any comparative cost or
feasibility studies, of any kind, to determine the potential use, if any,
of

aid in its transportation needs. If Butterfield Oil Company were to use
rail

traffic, it would never ship more than 50 carloads of fuel oil and LP gas in any given year. Such minimal traffic would provide little revenue to the railroad. The primary concern of Butterfield Oil Company is to retain the nylon of rail transport for use at some future date if conditions change markedly.

16. The city government of Butterfield considers the removal of any Railroad track located in the town to be a potential threat to local industry.

17. Although federal safety requirements dictate that all unretired track be maintained in at least a Class I condition, it is the practice of the railroad, in the absence of service demands, to allow spur trackage to deteriorate. If service demands develop, the track is repaired. If no usage occurs, at some point, it seeks to retire the track. Since tracks 80, 85 and 174 have not been retired, the Railroad could, at any time, be required by federal and state safety officials to return the track to at least a Class I safety standard, irrespective of a lack of shipper use.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The subject matter of the Petition is within the jurisdiction of the Minnesota Transportation Regulation Board and the matter is properly before the Administrative Law Judge pursuant to adequate notice. All requirements of law or rule have been fulfilled.

2. Restoration of ICC Tracks No. 80, 85 and 174 to, Minimum Class I FRA safety standard and their annual maintenance would require a significant expenditure by the Railroad.

3. There is no recent past or reasonably projected future shipper need for the use of the track.

4. Removal of the track will not substantially injure the public or be detrimental to their interests.

5. As a consequence of Conclusions 1 - 4, supra, removal and retirement of ICC Tracks No. 80, 85 and 174, as depicted on Railroad Ex. 1, is appropriate,

6. Any Finding of Fact more properly termed a Conclusion or any Conclusion more properly termed a Finding of Fact is expressly adopted as such,

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN, THE TRANSPORTATION REGULATION BOARD WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

It is the recommendation of the Administrative Law Judge to the Board that it issue the following:

ORDER

IT IS HEREBY ORDERED that the Petition of the Chicago & North Western Transportation Company for authority to remove and retire those portions of ICC Track Nos. 80, 85 and 174 depicted in yellow marking on Railroad Ex. 1 is approved.

IT IS FURTHER ORDERED that Petitioner shall, no later than 180 days from the date of this Order, comply with the following:

1. Remove the subject track.
2. Remove crossbucks or signals from the crossing, if applicable.
3. Restore the crossing surface to a condition satisfactory to the appropriate road authority, if applicable.

Dated this 26th day of June, 1987.

BRUCE D. CAMPBELL
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve is final decision upon each party and the Administrative Law Judge by first class mail.

reported: Tape Recorded.

MEMORANDUM

Minnesota Statutes 219.681 (1986), requires that a track that has been directly by the shipping public not be abandoned, closed for traffic or moved without the prior approval of the Board. The statute contains no standard for the Board's decision. Minnesota Statutes 219.741 (1986), provides a procedure when a railroad desires to abandon any track, including a provision for hearing. That statute does not, however, provide a standard for the Board's decision.

Prior to 1945, the Railroad and Warehouse Commission was empowered to Prorize the abandonment of a side track or spur only if the proposed abandonment "will not result in substantial injury to the public". Minn. Stat. 219.74 (1943). In 1945, the standard was removed from the statute and it has remained without a standard to the present. Laws of Minnesota, 1945,

Under the Administrative Procedure Act, the Board may not act arbitrarily

must have a basis for determining whether or not a track should be removed. Although the governing statute does not provide an operative standard statutes in pari materia outline the considerations that would be important to the Board's judgment in a track removal case. For example, Minnesota Statutes 219.71 (1986), governing the abandonment or removal of a

or terminal, allows removal if the abandonment or removal will result in inefficiency in railroad operation and will not substantially injure the public

or be detrimental to the public welfare. Minnesota Statutes 219.85 (1986),

authorizes an abandonment or reduction in agency service, after hearing, if the Board determines that such service is not required by the "public convenience and necessity". In Chicago & North Western Transportation Co., Order No. R-4041, D-5395, October 16, 1985, the Board adopted the Report of an Administrative Law Judge which balanced the cost to the Railroad of track repair and maintenance against the amount of present and reasonably projected future shipper use of the track.

[The Administrative Law Judge finds that the appropriate standard to guide

the Board's determination includes a balancing of the following factors to examine the requirements of the public interest: the cost to the Railroad

and maintenance of the track; the past, present and reasonably anticipated future use by shippers of the track; the revenues to be derived by the Railroad from the track if it is used by shippers; the overall financial condition of the Railroad; and the impact of track removal on transportation service available to the community and affected shippers.

In considering the appropriate factors, it is also relevant to note that a railroad may not be required to re-establish a track once its removal has been authorized. *Chicago Railway Co. v. Railroad Commission*, 181 Wis. 91, 193 N.W. 981 (1923); *Missouri Pacific Railway Co. v. United States*, 625 F.2d 178, reh. den., 625 F.2d 184 (8th Cir. 1980).

The operative facts in this proceeding are not open to substantial dispute. ICC Tracks No. 80, 85 and 174 were initially built prior to 1913. In recent memory, the tracks have not been maintained and they are in a state of disrepair. Railroad Ex. 2. The current condition of the tracks does not comply with the minimum safety standards required by the FRA for Class I track. The track has not been used for at least the last five years and there is no evidence in the record of when they were last used for transportation purposes. Repair and maintenance of the track will require a significant expenditure by the Railroad. Balanced against these facts in the argument of the shippers herein that there may be some potential use for the track should their transportation needs change. The argument advanced by the shippers is that the Railroad need not incur any expenses in the maintenance of the track but should allow it to remain in its present condition indefinitely. If their transportation needs change at some future time, the track could then be refurbished, possibly with the financial assistance of the shippers.

The Administrative Law Judge, for the reasons stated in the Findings, rejects the arguments of the shippers. Initially, the Railroad does have an obligation to maintain all track that has not been retired in at least at Class I FRA safety standard, As demonstrated by Railroad Exhibit No. 3, track must be inspected monthly and if deviations from the safety standards are determined, repair operations must be undertaken. The Administrative Law Judge cannot deny that the Railroad has not followed the federal standard contained in Railroad Exhibit No. 3. As a practical matter, it appears that the Railroad allows its unused track to deteriorate and then either seeks its removal or undertakes repair when there are shipper demands. This practice does not accord with the federal standard. At any time, federal or state safety examiners could require the Railroad to bring track up to a Class I condition, irrespective of whether there is shipper use. That likelihood is heightened, in this case, by the fact that the current deteriorated condition

of the track is now a matter of public record

The only reason advanced by the shippers and the City for the maintenance of the track is some indefinite possible future use, should shipping needs change. Although witnesses for Butterfield Oil and Butterfield Foods talk generally about their need for railroad service, the Administrative Law Judge concludes that they are merely seeking to keep all options open in the event that some future change might make railroad transport compatible with their business. Although both companies have recently reviewed their shipping needs and transportation services, no examination of railroad transport was made. Moreover, neither company has communicated to the Railroad, or advanced at the hearing, any definite plans to make use of railroad services. Moreover, the instant Petition was made known to the shippers in early March of 1987. Between March and the date of the hearing, approximately three months, no shipper developed any specific plans to use rail transport, either now or in the reasonably foreseeable future. Under such circumstances, the Administrative Law Judge finds that the possible future needs of the shippers are not the type of reasonably projected future need for service that has been recognized in legally related contexts, including the definition of public

convenience and necessity as applicable to motor transport, Minn. stat.,
sec. 221.071 (1986); Chicago & Northwest Railway Co. v. Vershingle,
197 Minn
268 N.W. 2 (1936).

The Administrative Law Judge notes that the Board has authorized the
removal of track even when there has been recent shipping activity. when
thp

it of traffic is not profitable for railroad operations In the
Matter of

Petition of Chicago & North Western Transportation Co., Order No. R-
4041; .

No. D-5395, October 16, 1985. The Administrative Law Judge does
not

however, conclude that the Railroad is entitled to remove any and all
trackage

when operations on that isolated piece of track do not result in
significant

profit. It is the entire intrastate operation of the Railroad that is
determinative when demonstrated shipper needs are involved

in the absence of reasonably anticipated future transportation need for
track and the existence of the requirement that the Railroad maintain
its
removal in a Class I condition, the Administrative Law Judge conclude
that

claim of the track is appropriate, In making this Finding, the
administrative Law Judge is also influenced by the fact that the shippers,
who

date to be reviewing transportation needs, did not project any
particular

When they would be more certain of the amount of future rail transport
Usk No purpose would be served by delaying the decision herein for an
indefinite period. In essence, what the Protestors herein desire is
for the

railroad to provide them, at its expense, with insurance against future
contingencies affecting their shipping needs. No consideration of law
or
policy appropriately places that burden on the Railroad.

B.D.C